No. ... 2730 .

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JACK IRVINE,
Appellant,

VS.

ANGUS McDOUGALL, J. A. HEALEY, GEO. M. SMITH and ROY RUTHERFORD,
Appellees.

Appeal from United States District Court, Territory of Alaska, Fourth Division.

BRIEF ON BEHALF OF APPELLEES

CECIL H. CLEGG,
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Statement of the Case.

This suit was commenced by plaintiff in his own behalf and as the assignee of the claims of six others, to foreclose certain alleged mechanics' liens upon certain mining property described in the complaint, under the provisions of chapter 28 of the Compiled Laws of Alaska.

The answer of appearing defendants denied all the allegations of the complaint and the fact of the assignment to plaintiff of each of the liens sought to be

foreclosed. At the trial the Court sustained the lien of plaintiff in full and for attorney's fees, but found for the defendants as to the six succeeding causes of action set forth in the complaint.

The evidence on the part of plaintiff and the pleadings were to the effect that claimants were all laborers, except Wensel, who was a cook, Sully, who was a carpenter, and Fox, who was an engineer, and that, on the 20th day of May, 1913, they (with the exception of King, who assigned his claim the day before the trial) assigned their claims for wages to plaintiff and all rights they had by virtue of having filed a lien; that none of them had filed any lien notice at that time, and that all the lien notices were later and subsequent to the 20th day of May, 1913, filed for record by Harry E. Pratt, one of the attorneys for plaintiff. Defendants introduced no evidence.

The liens of the five claimants other than plaintiff and King were denied by the Court, upon the ground that said claimants assigned their claims to the plaintiff at a time prior to the perfection of the liens claimed, by the filing of the lien notices with the Recorder of the Fairbanks Precinct, wherein the property sought to be charged with the liens is and was situate (Findings 28 and 29. Transcript p. 80) and rejected King's claim because it was not assigned before suit was filed.

Neither Sully nor Berks testified in the case, nor were they present at the trial.

The defendant Healy is a prior attaching creditor. Defendants Rutherford and Smith are trustees for the benefit of all creditors, including lien claimants.

Argument.

As to the claim of King, there is no assignment of error made by the appellant with reference to the Court's action, although it is contended in the brief of appellant that the action of the Court is erroneous with reference thereto, for the reason, as he states, that the claimant King made an oral assignment of his lien to plaintiff prior to the filing thereof. (Transcript, p. 45.)

It is seen by the record referred to that, in the statement to the Court by Mr. Pratt, one of the attorneys for plaintiff, he claims that Mr. King made an oral assignment of King's claim and lien to take effect as soon as the lien was filed. This is at variance with the allegations of his complaint, and there is no testimony anywhere else in the record, by Irvine or King, to this effect, and an unverified and unsupported statement of the attorney for plaintiff will surely not be considered of such weight as would justify this Court in holding that the trial Court erred in deciding that point as he did, especially when the plaintiff's own witnesses disprove the allegations of the complaint and no request was made to amend the complaint or to frame any issue upon any other theory than a written assignment by said King.

It is clearly shown by the testimony on cross-examination of the witnesses Fox and Hayes that the assignment of the claim of Fox, Hayes, Wensel, Sully, and Berks was made on the 20th day of May, 1913; that the signatures of all the claimants, except King, were placed to the assignment on the same day; that this was the same day that the liens were drawn, sworn, and subscribed to by the vairous claimants; and that this was prior to the time when the lien notices were filed for record—the lien notices of Fox and Hayes having been so filed on June 2nd, 1913, Wensel's and Sully's on the 27th of May, 1913, and Berks' on the 7th of June, 1913.

The undated written assignment introduced in evidence (Transcript p. 41) indicates that these claimants attempted in this instrument, made on the 20th day of May, 1913, to assign to plaintiff their rights to liens on the property; but such attempted assignment at that time could not carry the liens with it. The evidence further shows that, when the lien notices were signed and sworn to, they were left in the posession of one of the plaintiff's attorneys; that he himself filed them for record (as shown by endorsements of the seven original exhibits), and by Mr. Pratt's statement it is shown that they remained thereafter in his possession to the date of the trial and were never really delivered to the plaintiff Irvine or anybody else. (Transcript, statement of Mr. Pratt, p. 45.)

As to these liens, the Court denied them on the

ground that they assigned their claims, upon which the alleged liens are based, to plaintiff prior to the date of their filing for record, the Court properly and correctly holding that no lien exists until the notice of lien is filed as prescribed by statute.

That a mechanic's lien, under our Code, is merely an inchoate right on the part of the claimant, which may ripen into a perfected lien by the filing thereof, has been well settled by the adjudicated cases. The statute says in effect: "You may have a lien, provided you comply with the mandate of the statute."

25 Pac. 1070.
32 Pac. 169.
37 Pac. 626.
7 N. W. 401.

No assignment of the claims for money due could carry with it the right on the part of plaintiff to perfect these liens, the right to a lien being a personal one. The mere right to a lien is not assignable.

7 N. W. 401.
4 Ore. 29.
118 Pac. 103-113.
27 Cyc. 255-256.
32 N. W. 219.
87 N. E. 718-19.
142 Pac. 785.
41 Pac. 1103.
90 N. E. 73.

The assignment of the claims before the perfection of the liens by filing with the Recorder destroys

the right to a lien.

56 N. W. 722.

35 N. E. 638.

25 Pac. 1070.

Boisot, Mechanic's Liens, sec. 10.

Having assigned their claims prior to the filing of the lien notices, the notices when filed did not contain a true statement as to the person to whom the money was due, and in this respect the statements contained in the lien notices to that effect when filed were false.

II.

No issue was raised in the Court below as to personal judgment against McDougal. It was not asked for nor suggested to the Court. It is not made the basis of any proposed finding of fact or conclusion of law submitted by plaintiff, nor is it the subject of any assignment of error; therefore, if it was error, the fault lies with appellant and not with the Court nor with the answering defendants. (Par. 4, Rule 24, Circuit Court of Appeals, Ninth Circuit.)

That it was not error his already been decided by this Court in Russel vs. Hayner, 130 Fed. p. 90, cited by appellant.

Appellant entirely disregards new equity rule No. 71 and did not serve the praecipe for the transcript upon attorneys for appellees, who had no opportunity to insist upon the printed transcript containing all the evidence necessarry to enable this Court to pass upon the point involved. There was omit-

ted from the transcript the written opinion filed by the trial Court in deciding the case at bar, although section 3 of rule 62 of the Rules of the District Court for the Fourth Judicial Division of the Territory of Alaska contains the following provision relative to writs of error, appeals, etc.: "3. He (appellant or plaintiff in error) shall also make and annex to the record and transmit a copy of any opinion or opinions filed in the case, and in cases at law a complete copy of the charge of the Court to the jury." A certified copy of which rule we beg leave to file herewith, and which rule is printed in the appendix to this brief. Appellant also omitted from the record the original lien notices filed as exhibits in this cause at the trial thereof, the endorsements upon which show that the original lien claimants did not file their alleged liens for record, but all said liens were filed by Harry E. Pratt, the attorney for the lien claimants and attorney for the plaintiff in this action, and we likewise append hereto a copy of a certificate of the clerk of the District Court, in whose custody said exhibits are lodged, showing the facts to be as alleged, the original certifiate being filed herewtih.

The Hon. Charles E. Bunnell, the trial Judge before whom the cause was heard, on the first day of June, 1915, filed his written opinion in the Court below, wherein he considered and passed upon the merits of the case and expressly found that all the assignments of claims to plaintiff were made prior to the filing thereof, with the exception of that of

King, who did not assign his claim until the day before the trial of the case, more than a year and a half after the suit was instituted. A copy of which said opinion is set forth in the appendix hereto, and a certified copy of the same is lodged with the clerk of the United States Circuit Court of Appeals for the Ninth Circcuit.

Attorneys for appellees have filed a motion in this Court to require the appellant to file a supplemental transcript, containing the exhibits above referred to and the written opinion of the trial Judge filed in this cause, but to avoid delay have attempted, at their own expense, to correct the error on the part of the appellant, by furnishing such information as would be supplied by the supplemental transcript by an appendix hereto, containing copies of certified copies and of certain certificates lodged with the clerk of this Court.

Elsewhere in this brief we have referred to the exhibits in the case and the endorsements thereon, although these are not part of the transcript now on file, as above explained, and we crave the Court's indulgence in this respect, as such statements are based upon our anticipation of favorable action by the Court upon our motion for a supplemental transcript or the Court's acceptance of the appendix hereto in lien thereof.

Appellees contend that there is but one question involved, i. e.: Were the claims for liens assigned to plaintiff by the respective claimants before they were

filed? If any conflict of testimony existed (and we contend that there is no conflict), the trial Court found as a matter af fact that they were so assigned prior to the filing thereof, and thus a question of law does not arise, as appellant's counsel impliedly, if not expressly, admit that, if such was the case, the right to a lien was lost. We submit that the trial Court was not in error, as contended by appellant, and that the judgment, so far as it is in favor of defendants, should be affirmed.

Respectfully submi tted.

CECIL H. CLEGG,
Attorney for Appellee John A. Healy.
McGOWAN & CLARK,
THOS. A. McGOWAN,
JOHN A. CLARK,
Attorneys for Appellees Rutherford and Smith, Trustees.

APPENDIX A.

In the District Court, Territory of Alaska, Fourth Division.

RULE 62.—WRITS OF ERROR, APPEALS, RETURN AND RECORD.

1. Whenever any writ of error shall be directed to this Court the Clerk thereof shall immediately make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the Court.

2. In all cases taken to the Appellate Court by

writ of error or appeal to review any judgment or decree, the Clerk of this Court shall annex to and transmit with the record the original writ of error and citation or citations, issued in the cause, and a certificate under seal stating the cost of the record and by whom paid.

3. He shall also make and annex to the record and transmit a copy of any opinion or opinions filed in the case, and in cases at law a complete copy of the charge of the Court to the jury.

4. The record prepared shall be complete, containing in itself, and not by reference, all the papers, exhibits, depositions, and all other proceedings in the action.

5. Whenever, in the opinion of the Judge of this Court, it shall seem necessary or proper that original papers of any kind shall be inspected by the Appellate Court upon writ of error or appeal, he shall make such rule or order for the safe-keeping, transporting and return of such original paper as to him may seem proper.

6. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time and be served before the return day.

7. The record in cases of admiralty and maritime jurisdiction shall be made up as provided in General Admiralty, Rule 52 of the Supreme Court.

8. Whenever it is necessary to attach any document, paper, testimony or other proceeding in a foreign language to the record on appeal or writ of error, the Clerk of this Court shall cause a correct translation thereof to be made and forwarded with

the original document.

(Rule 14 U. S. Circuit Court of Appeals, Ninth Circuit.)

United States of America, Territory of Alaska, Fourth Division,—ss:

I, J. E. Clark, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the above and foregoing is a full, true and complete copy, and the whole thereof of Rule 62, on page 24 of the Rules of the United States District Court for the District of Alaska, Fourth Division.

In witness whereof, I have hereunto set my hand and affixed the seal of this Court at Fairbanks, Alaska, this 10th day of January, 1916.

(SEAL)) J. E. CLARK,
Clerk of the District Court, Territory of Alaska,
Fourth Division.

APPENDIX B.

In the District Court for the Territory of Alaska, Fourth Judicial Division.

Jack Irvine, Plaintiff, vs. Angus McDougall, Thomas A. McGowan, John A. Clark, Dave Cascaden, J. A. Healey, Geo. M. Smith, John Kopitzv, and Roy Rutherford, Defendants.

NO. 1938.—DECISION.

This is an action to foreclose laborers' liens upon the Pioneer Quartz Mining Claim situate at the head of Fairbanks Creek, in the Fairbanks Recording Precinct, the plaintiff claiming a lien on behalf of himself for labor performed in the development of said Pioneer Quartz Mining Claim, and also as the assignee of six other lien claimants.

The plaintiff alleges the performance of certain

development work on the Pioneer Quartz Mining Claim under contract with the defendant McDougall; a compliance with the privisions of the statute entitling plaintiff to foreclose a lien for services rendered and the usual allegations in a complaint seeking foreclosure if a Mechanics' Lien. Similar allegations are made in the respective causes of action of the other six lien claimants and the further allegation of assignment by each lien claimant of his claim of lien to the plaintiff herein.

Plaintiff alleges that the owners of said mining claim on the 25th day of May, 1912, were Angus McDougall, Michael Hyland, who prior to the filing of the complaint herein sold his interest to Dave Cascaden, Thomas A. McGowan and J. A. Clark, who upon said date leased said claim to Angus McDougall for a period of ten years. That the defendant John A. Healey on the 12th day of May, 1913, caused a writ of attachment to issue against said McDougall and levied the same upon said Pioneer Quartz Mining Calim. That on or about the 3rd day of June, 1913, said McDougall made an assignment of certain property to Geo. M. Smith and Roy Rutherford for the benefit of his creditors assigning among other property his undivided interest in and to said Pioneer claim and leasehold interest therein. Plaintiff's complaint herein was filed in the Court on the 21st day of August, 1913. The defendants Smith, Rutherford and Healey have answered. The defendant McDougall is in default. From the record it appears that defendants McGowan, Clark, Cascaden and Kopits have not been served.

In the first place the Court calls attention to the second paragraph of the note to Title XII, page 276

of the Compiled Laws of Alaska:

> "The safe and proper rule of construction of Mechanics' Lien statutes is that while the remedial portions of these statutes should be liberally construed, with a view to avoid defeating the purpose of the statute, yet those parts upon which the right to the existence of a lien depend, being in derogation of the common law, should be strictly construed:
>
> Morris v. Marsh (3 Alaska Rep. 144.)"

Chapter 28 of the Compiled Laws of Alaska definitely sets forth what the claimant must do in order that he may have a lien. No liberal construction is permitted to be applied to the mandatory requirement of the statute that the claim of lien must be filed within the specified time in order that it may become an actual lien instead of a claim and may charge the property with a special statutory liability.

The evidence shows that on the 20th day of May, 1913, the plaintiff Irvine and five of the other claimants subscribed and swore to their respective Claims for Mechanic's Liens; ;that the seventh claimant subscribed and swore to his Claim for Mechanic's Lien on the 28th day of May, 1913, and that it was filed for record in the office of the Recorder for the Faribanks Recording Precinct on the same date. Irvine's Claim was filed for record on the 7th of June, and the other Claims were filed between the 27th of May and the 7th of June.

No lien exists until the Claim of Lien is filed as prescribed by statute. The provisions of the statute permit of no other construction. The statute plainly says to the claimant that if a special security is de-

sired then the claimant must fully comply with the special provisions of the statute designed to afford such special security.

The evidence shows that all the claimants who assigned to Irvine, with the exception of one King, made such assignments prior to the time of filing their several claims with the recorder. The claimant King on cross-examination testified that he had made his assignment the day prior to May ...., 1915, the date on which he testified in the trial of this case.

Plaintiff's Exhibit "I," introduced in evidence, reads as follows:

> "For value received, I hereby assign and sell to Jack Irvine, my claim against Angus McDougall for work and labor performed upon the Pioneer Quartz Mining Claim at the head of Fairbanks Creek and also any and all rights which I may have by virtue of having filed a mechanic's lien for said amount upon said claim.
>
> "JAMES FOX.
> "DONALD HAYES.
> "JOHN WENSEL.
> "JOHN H. SULLY.
> "HENRY BERKS.
> "TOM KING."

The evidence shows that at the time this instrument, which is not dated, was signed, the respective claimants, with the exception of King, had not filed their respective claims of lien, and therefore their liens as such were not assigned.

In each cause of action except the first in plaintiff's complaint it is alleged "that subsequent to the filing of said lien said (claimant), for a valuable consideration, assigned said claim against said McDougall and

all rights by virtue of having filed said lien, to the plaintiff, who is now the owner and holder thereof."

In the absence of any statute to the contrary the assignment of the claim before the perfection of lien destroys the right to lien.

56 N. W. 722; 35 N. E. 638; 25 Pac. 1070.

See also Arndt v. Manger et al., No. 1838, records of this Court (unreported).

It is stated in Boisot on Mechanic's Liens, Sec. 10, as follows:

"In several of the states the statute expressly declares that mechanics' liens are assignable. Where this is the case, the question is, of course, at rest, so far as that state is concerned. But where the statute says nothing on that subject, the question of assignability depends mainly upon the point whether or not the lien has been perfected by filing the claim before the assignment is made. In nearly all the states the person claiming the lien is obliged, in order to perfect it, to file a claim verified by affidavit, showing, among other things, the amount that is due to him for labor or materials furnished by him. If he has assigned the account before he files his claim, he cannot truthfully swear that there is anything due him, because the debt is then due, not to him, but to his assignee. But his assignee cannot truthfully swear that he has either done work or furnished materials, and it is only to those who furnish either labor or materials, or both, that a lien is given. It follows, logically, from this reasoning, that a mechanic's lien, before being perfected by filing a claim, is not assignable; and a majority of the

decisions so hold."

The mere right to a lien is not assignable:

7 N. W. 401. 32 N. W. 219. 41 Pac. 1103.
4 Oreg. 29. 57 N. E. 715. 90 N. E. 73.
118 Pac. 103-113. 142 Pac. 785.
27 Cyc. 255-256.

Regarding the lien of Irvine, the plaintiff herein, the Court finds from the evidence that he has a valid lien on the property described, as alleged in the first cause of action, and that his lien is superior to the attachment of the defendant Healey.

In accordance with the views herein expressed, findingss of fact, conclusions of law, judgment and decree may be prepared and submitted.

Dated this 1st day of June, 1915.

CHARLES E. BUNNELL,
District Judge.

APPENDIX C.

In the District Court for the Territory of Alaska. Fourth Judicial Division.

Jack Irvine, Plaintiff, vs. Angus McDougall, J. A. Healey, Geo. M. Smith, and Roy Rutherford, Defendants.

NO. 1938.—CERTIFICATE.

United States of America, Territory of Alaska, Fourth Judicial Division,—ss:

I, J. E. Clark, do hereby certify that I am the Clerk of the United States District Court for the Fourth Judicial Division of the Territory of Alaska, and as such am custodian of all the original papers, files, and records in the above entitled cause, and that I have in my possession, as such Clerk, all the exhibits filed in said cause during the trial thereof;

that, at the request of the attorneys for the defendants above named, I have examined the endorsements on the exhibits filed on behalf of plaintiff, and particularly the endorsements on the lien notices filed on behalf of plaintiff in support of his case, said endorsements having been placed thereon by the deputy Recorder for the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, at the time said liens were filed for record, with the following results:

Exhibit A, lien claim of Jack Irvine, filed for record 7 June 1913, at request of Harry E. Pratt, as instrument No. 38949;

Exhibit C, lien claim of John Wensel, filed for record 27 May 1913, at request of Harry E. Pratt, as instrument No. 38905;

Exhibit D, Lien claim of Donald Hayes, filed for record 2 June 1913, at request of Harry E. Pratt, as instrument No. 38935;

Exhibit E, lien claim of James Fox, filed for record 2 June 1913, at request of Harry E. Pratt, as instrument No. 38934;

Exhibit F, lien claim of Henry Berks, filed for record 7 June 1913, at request of Harry E. Pratt, as instrument No. 38950;

Exhibit G, lien claim of Thomas King, filed for record 28 May 1913, at request of Harry E. Pratt, as instrument No. 38907;

Exhibit H, lien claim of John Sully, filed for record 27 May 1913, at request of Harry E. Pratt, as instrument No. 38904;

That at the time said liens were filed for record, as shown thereon, John F. Dillon was United States Commissioner and ex-officio Recorder in and for

the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, and C. E. Wright was deputy Recorder, and all said endorsements on said exhibits have stamped thereon the name of "John F. Dillon, Recorder," and underneath is stamped the word "By" and then the name of "C. E. Wright" is written thffereon, with the word "Deputy" underneath said name, and said endorsements of record bear the same dates that are given in the complaint on file in said action as the dates when said instruments were recorded.

(SEAL) J. E. CLARK,

Clerk of the United States District Court for the Territory of Alaska, Fourth Judicial Division.